

IN THE SUPREME COURT OF THE STATE OF DELAWARE

COREY BARBOUR,	§	
	§	No. 540, 2010
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE	§	ID No. 0901013261
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: March 21, 2011

Decided: May 13, 2011

Before **HOLLAND, BERGER, and RIDGELY**, Justices.

ORDER

This 13th day of May 2011, it appears to the Court that:

(1) Defendant-Below/Appellant, Corey Barbour, appeals from a Superior Court order, which imposed a mandatory five-year prison sentence after Barbour pled guilty to possession of a deadly weapon during the commission of a felony (“PDWDCF”) under title 11, section 1447 of the Delaware Code. Barbour contends that “the Superior Court erred as a matter of law in [s]entencing him not under the two year minimum, mandatory sentence set forth under [title 11, section 1447 of the Delaware Code], but the five year minimum, mandatory sentence for third felonies under [title 11, section 1447A of the Delaware Code].” Barbour was charged by indictment with and pled guilty to PDWDCF under section 1447, but

the sentence order cited to possession of a firearm during the commission of a felony (“PFDCF”) under section 1447A. Although a five year sentence (without eligibility for good time, parole, or probation) may be imposed under section 1447, the Superior Court has discretion to impose a minimum of two years for this class B felony. It appears that the Superior Court determined that a mandatory five year term applied under section 1447A. Accordingly, we vacate the sentence order and remand to the Superior Court for resentencing consistent with section 1447.

(2) One evening, over two years ago, New Castle County 911 received a call regarding a gunshot victim. When police and paramedics arrived, they discovered a fifteen-year old female victim, Jasmine M. Lee. Lee had suffered a gunshot wound to the head. She was transported to a nearby hospital, but pronounced dead shortly thereafter. That same day, Barbour received *Miranda* warnings and then admitted that he accidentally shot Lee in the head with a .357 revolver.

(3) Barbour was charged by indictment with manslaughter, PDWDCF, possession of a deadly weapon by a person prohibited (“PDWBPP”), receiving a stolen firearm, and three counts of endangering the welfare of a child. For the PDWDCF count, the indictment cited to title 11, section 1447 of the Delaware Code.

(4) At Barbour's plea hearing, defense counsel explained: "Corey has acknowledged . . . that he faces . . . a minimum of two years up to 25 on [PDWDCF]" The prosecutor disagreed and stated her belief that the minimum mandatory term was three years. The plea hearing judge then asked the parties to submit memoranda on the issue. The plea hearing resumed, and the following exchange occurred:

Court: Do you understand that you face a minimum of four years in jail and a maximum of 58 years?

Barbour: Yes, sir.

Court: Do you understand that minimum may become an additional year should the Court rule in the State's favor?

Barbour: Yes, sir.

Barbour then pled guilty to manslaughter, PDWDCF, and PDWBPP. The plea hearing judge accepted Barbour's plea as knowing, intelligent, and voluntary, and ordered a presentence investigation.

(5) A different Superior Court judge then presided over Barbour's sentencing hearing. At that hearing, the prosecutor made a statement, during which she asked the sentencing judge to impose a five year sentence for the PDWDCF conviction. Defense counsel also made a statement, during which the following exchange occurred:

Defense Counsel: . . . The minimum mandatory that we discussed when we entered this

plea . . . was four years. I don't expect to get that.

Court: That's actually not correct. It's -- actually, the minimum is five years, because of the nature of the prior violent felony, the firearm charge has a three-year mandatory.

Defense Counsel: And we briefed that with [the plea hearing judge]. He ordered briefing; but he didn't get that far because the State had conceded it was two [years]. So, I don't know if that will impact your sentence or not. I just want to make the Court aware of it.

So, I know we're going to get more than the minimum, I think I think he's very close to the minimum, Judge. So I'd ask for a sentence, you know, above the minimum, six years, followed by flow-down I know he did want to address the Court, as well, your Honor.

Court: Very well.

(6) Following allocution, the sentencing judge sentenced Barbour for the manslaughter, PDWDCF, and PDWBPP convictions. For the PDWDCF conviction, the sentencing judge stated: "Possession of a deadly weapon during the commission of a felony, all time that I impose is mandatory by statute . . . five years at Level V." The accompanying written sentence order relevantly provided:

PDWDCF

The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5[.]

"All time imposed is mandatory." PFD CF 11 Del. C. 1447A.

This appeal followed.

(7) We may review a defendant's sentence for the following: (1) unconstitutionality, (2) factual predicates which are either false, impermissible, or lack minimum indicia of reliability, (3) judicial vindictiveness, bias, or sentencing with a "closed mind," and (4) any other illegality.¹ Except for these constitutional and legal constraints, our review of Barbour's sentence is limited to determining whether the sentence is within the limits that the statute prescribes.²

(8) Title 11, section 1447 of the Delaware Code addresses PDWDCF. That section relevantly provides:

(a) A person who is in possession of a deadly weapon during the commission of a felony is guilty of possession of a deadly weapon during commission of a felony.

Possession of a deadly weapon during commission of a felony is a class B felony.

(b) Any sentence imposed for a violation of this section shall not be subject to suspension and no person convicted for a violation of this section shall be eligible for good time, parole or probation during the period of the sentence imposed. . . .

Title 11, section 1447A of the Delaware Code addresses PFDCEF. That section relevantly provides:

(a) A person who is in possession of a firearm during the commission of a felony is guilty of possession of a firearm during the commission of a felony. Possession of a firearm during the commission of a felony is a class B felony.

¹ *Siple v. State*, 701 A.2d 79, 83 (Del. 1997) (citing *Morales v. State*, 696 A.2d 390, 394 (Del. 1997)).

² *Id.* (citing *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992)). See also *Jenkins v. State*, 8 A.3d 1147, 1155 (Del. 2010) (citing *Siple*, 701 A.2d at 83).

(b) A person convicted under subsection (a) of this section shall receive a minimum sentence of 3 years at Level V, notwithstanding the provisions of § 4205(b)(2) of this title.

(c) A person convicted under subsection (a) of this section, and who has been at least twice previously convicted of a felony in this State or elsewhere, shall receive a minimum sentence of 5 years at Level V, notwithstanding the provisions of §§ 4205(b)(2) and 4215 of this title.

(d) Any sentence imposed for a violation of this section shall not be subject to suspension and no person convicted for a violation of this section shall be eligible for good time, parole or probation during the period of the sentence imposed. . . .

Title 11, section 4205(b) of the Delaware Code relevantly provides that “[t]he term of incarceration which the court may impose . . . [f]or a class B felony [is] not less than 2 years up to 25 years to be served at Level V.” Consequently, section 1447 - PDWDCF -- provides for a minimum mandatory sentence of two years,³ and section 1447A -- PFDCF -- provides for a minimum mandatory sentence of three years, notwithstanding the application of section 4205(b).⁴ Section 1447A also provides for a minimum mandatory sentence of five years if the defendant previously has been convicted of two felonies.⁵ Both section 1447 and section 1447A provide that any sentence imposed above the minimum is mandatory.⁶

(9) The parties agree that Barbour was charged by indictment with and pled guilty to PDWDCF under section 1447. Although the written sentence order

³ See 11 Del. C. §§ 1447(a), 4205(b).

⁴ See 11 Del. C. § 1447A(b).

⁵ See 11 Del. C. § 1447A(c).

⁶ See 11 Del. C. §§ 1447(b), 1447(d).

correctly identified the offense as PDWDCF, the sentence order then provided for a mandatory five year sentence and cited to a separate crime for which Barbour was not indicted -- “PFDCF 11 Del. C. 1447A.” We cannot presume that the citation to section 1447A was a clerical error.⁷ The sentencing judge stated that the minimum is five years even though Barbour pled guilty to violating section 1447. Barbour should have been sentenced pursuant to the statutory provision that the indictment charged and to which he pled guilty -- section 1447.⁸

NOW, THEREFORE, IT IS ORDERED that the sentence order of the Superior Court is **VACATED** and this matter is **REMANDED** to the Superior Court for resentencing consistent with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

⁷ See *Priest v. State*, 947 A.2d 1123, 2008 WL 1991820, at *1 (Del. 2008) (TABLE) (“Although ‘[f]ederal courts have consistently held that when there is a direct conflict between an unambiguous oral pronouncement of a sentence and the written judgment, the oral pronouncement controls,’ Delaware has not adopted the federal rule.”) (quoting *Bland v. State*, 911 A.2d 802, 2006 WL 2960050, at *1 (Del. 2006) (TABLE)).

⁸ See *Benton v. State*, 12 A.3d 1153, 2011 WL 379197, at *1 (Del. 2011).